CHAPTER FOUR

THE WARRANTY CLAUSE

Background

Even after a sale of property was complete, the purchaser still faced the potential risk of legal challenges to the validity of his acquisition. To guarantee his property rights, deeds of sale would include what we shall refer to as a warranty clause.¹ Warranty clauses are as old as the deed of sale itself and are certainly not an innovation of Aramaic scribes. Nonetheless, in this chapter, we shall consider whether there are any properties either in form or function that are distinctive of the Aramaic warranty clause. When considering this question, however, we should keep in mind the degree to which form and function converge. For example, one key element of the Aramaic warranty clause concerns the seller’s obligation to defend the purchaser’s property rights against anyone who doubts that purchaser was conveyed good title. Specifically, the clause says that the seller is to “clear” or “clean” the property of any such claims. This element first appears in deeds of sale from the Old Assyrian and Old Babylonian periods, but then disappears from the cuneiform legal tradition by the end of the 2nd millennium BCE. It emerges once again in cuneiform deeds of sale from the later Neo-Babylonian period, presumably through the mediation of Aramaic.² Thus, with regard to form and function, do these changes in the language of the deed of sale reflect changes in the process by which property was conveyed and registered? Or do they simply reflect the

¹ Most discussions of the Aramaic material refer to this clause as the “defension clause.”
² D. M. Gropp (2001:24–25) assumes the opposite direction of influence, namely that the Neo-Babylonian defense clause is a retention of an older Mesopotamian tradition which is later borrowed into Aramaic. See p. 189 for further discussion.
vagaries by which legal language both waxes and wanes over time? Before we delve further into this question, let us first consider the body of evidence before us.

In order to deal with circumstances that arise once a transaction is completed, all deeds of sale include a set of contingency clauses. More specifically, they protect the integrity of the transaction and delineate the obligations of the parties to maintain this integrity. These obligations are usually borne by the seller and are generally expressed in two types of clauses: the no-contest clause and the warranty clause. In the no-contest clause, the seller renounces his right (and that of any heir or relative acting on his behalf) to at anytime in the future raise legal challenges against the transaction. If he were to initiate such a legal challenge, the clause would usually assess large penalties against him. The warranty clause, on the other hand, is concerned not with legal challenges raised by the seller, but with those initiated by a third party. When such claims are raised, the seller is obligated to defend the purchaser’s property rights in court. Should he be unsuccessful, he either replaces the property with something of equivalent value or simply refunds the purchase price.

A third-party challenge thus presents the seller with a two-part obligation, namely defending against the claim in court and compensating the purchaser in the event of unsuccessful defense. I could split up the two parts of this obligation and refer to them as the “defense clause” and the “eviction clause,” respectively, but I prefer to designate the language covering this two-part obligation as the “warranty clause.” The warranty clause may often only mention one part of this obligation, but the other would most likely have been implicit as well. Nonetheless, because the warranty clause in Aramaic deeds of sale usually specifies the former obligation (defense) and not the latter (restitution), discussions of the Aramaic materials tend to favor using the designation “defense

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3 These contingency clauses are commonly referred to in modern scholarship as the Schlussklauseln.

4 Other designations for this clause include the “waiver of suit” clause (Porten/Yardeni) and the “exclusion of litigation” clause (Cussini). German scholarship refers to it as the Verzichtsklausel (Oelsner 1980–83).

5 For a useful discussion of this distinction, see Steinkeller 1989:57–66. On this legal sense of “eviction,” see Black’s Law Dictionary (Garner 1999:575): “to recover (property or title) from a person by legal process.”

6 In this choice, I follow Rabinowitz 1956:142–52.